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No. 96-31

In The
Supreme Court of the United States
October Term, 1996

EVELYN SMITH,

Petitioner,

vs.

FAIR EMPLOYMENT AND HOUSING COMMISSION, KENNETH PHILLIPS, AND GAIL RANDALL,

Respondents.

On Petition for Writ of Certiorari
to the Supreme Court of California

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF DEFENDERS OF PROPERTY RIGHTS IN SUPPORT OF THE PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF DEFENDERS OF PROPERTY RIGHTS IN SUPPORT OF THE PETITIONER

Defenders of Property Rights (Defenders), moves this Court pursuant to Rule 21.2(b) of the Rules of this Court for leave to file the attached brief *amicus curiae* to present arguments stating why the Petitioner's petition for a writ of certiorari should be granted. This case raises significant issues regarding the power of a state to destroy constitutionally protected property rights through anti-

discrimination legislation. Specifically, the State of California has denied the Petitioner's constitutionally protected right to exclude others from her property. Furthermore, the State has not shown that its law banning discrimination against unmarried cohabiting couples substantially advances a legitimate state interest justifying the infringement of constitutionally protected property rights.

Defenders' mission is to vigorously protect constitutionally protected property rights. Attorneys of Defenders have been counsel of record or *amicus curiae* in numerous significant property rights cases nationwide involving government decisions affecting private property rights. *E.g.*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 114 S.Ct. 1003 (1994); and *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S.Ct. 714 (1995). Defenders has also devoted a significant portion of its resources to the litigation of regulatory taking issues across the country on behalf of property owners whose rights have been infringed in violation of the Fifth Amendment. Thus, Defenders is in unique position to illustrate the gravity of the California

Supreme Court's decision upon residential property owners nationwide. More importantly, the information presented in the attached brief will assist this Court in resolving the important constitutional issues at stake in this case.

Counsel for the Petitioner and counsel for Respondent California Fair Employment and Housing Commission, has consented to the filing of the attached brief *amicus curiae* and such consent has been lodged with the Clerk of this Court. Counsel for all other Respondents have refused to consent to the filing of the attached brief *amicus curiae* thereby necessitating the filing of this motion.

For the foregoing reasons, Defenders respectfully requests that this Court grant this motion.

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Dated: August 7, 1996

QUESTIONS PRESENTED FOR REVIEW

Whether the right to exclude others from private property is extinguished when the property is made available for rent?

Whether the right of a property owner to decide who may reside on her property -- which is a fundamental right of private property ownership -- may be destroyed without a showing that the ordinance substantially advances a legitimate and superior state purpose?

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BRIEF OF DEFENDERS OF PROPERTY RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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Pursuant to Rule 37.2 of the Rules of this Court, *amicus curiae* submits this brief in support of the Petitioner.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Defenders of Property Rights is the nation's only legal defense foundation devoted exclusively to protecting private property rights. Defenders was founded as a non-profit, public interest firm in 1991 in recognition that property rights are today under siege by excessive government regulations and actions which have the effect of rendering the Fifth Amendment's Just Compensation Clause worthless. Defenders' mission is to vigorously protect those rights considered essential by the framers of the Constitution, and to promote a better understanding of the relationship between private property rights and other individual rights such as religious liberty.

STATEMENT OF THE CASE

At issue in this case is the nature and extent of what this Court has historically and repeatedly described as the most fundamental right of private property ownership. Namely, the right to exclude others.

There is, of course, no question but that the right to exclude others from one's private property is fundamental to the very notion of private property ownership.[1] *See, e.g., Kaiser Aetna*, 444 U.S. 164 (1979). Indeed, numerous decisions of this Court have underscored this venerable principle of constitutional law. Justice Thurgood Marshall explained the principle most succinctly when he stated: "The right to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." *Loretto v. TelePrompter Manhattan CATV Corp.*, 458 U.S. 419, 443 (1982).

On the other hand, recent decisions by this Court suggest that the right to exclude others may be compromised when a property owner makes his property available as a rental unit. Specifically, in *Yee v. City of Escondido, California,* 503 U.S. 519 (1992), this Court faced a challenge to a rent control statute that required owners of mobile home units maintain rents at a certain rate, even when the mobile homes were sold. The park owners argued that the rent control

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[1] Indeed, in the instant case the Petitioner is forced to choose between the exercise of two constitutionally protected rights: the right to make reasonable use of her private property, *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992), and the right to free exercise of religious beliefs.

statute required them to acquiesce to an unwanted physical occupation of their private property by forcing them to keep lessees on their property who paid less rent than the lessors wished. The *Yee* Court flatly rejected this argument, holding that the rent control ordinance did not authorize an unwanted physical occupation of the park owners' property. *Id.* at 53

Some might argue that *Yee* stands for the proposition that because Petitioner -- in the instant case -- has voluntarily made her property available to others to rent, she has lost any and all claim to the constitutional right to exclude unwanted members of the public -- such as unmarried couples -- from her property. But, in point of fact, this Court has never addressed the extent to which the right to exclude is modified or extinguished when the property is made available for rent:

> [T]he Takings Clause requires compensation if the government authorizes a compelled physical invasion of property. But the Escondido rent control ordinance did no such thing. Petitioners voluntarily rented their land to mobile home owners. . . . Put bluntly, no government has required any physical invasion of petitioners' property. Petitioners' tenants were invited by petitioners, not forced upon them by the government.

Id. at 527-28.

This is not to suggest, however, that a property owner's ability to choose to whom he rents his property to is not subject to reasonable regulatory and constitutional requirements. *See, e.g., Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964)(law prohibiting motel owners from discriminating against individuals protected by the Fourteenth Amendment is legitimate exercise of Commerce Clause power) and *Prune Yard Shopping Center v. Robins,* 447 U.S. 74, 82-84 (1980)(property owners not free to exclude members of public whose rights to exercise free speech protected by state constitution).

However, numerous decisions of this Court have held that the right of a property owner to choose who may enter his property -- and who he may exclude from his property -- is not extinguished when the property is opened up to the public in general. *See, e.g., Dolan v. City of Tigard,* 114 S. Ct. 2309 (1994)(owner of commercial plumbing supply store open to the public not required to grant public easement as a condition of obtaining expansion permit) and *Kaiser Aetna v. United States,* 444 U.S. 164 (1979)(privately owned marina open to paying members of the public not converted into

public property by virtue of its being joined to navigable waters of the United States).

Finally, in 1977, this Court struck down a housing ordinance that limited occupancy of a dwelling unit to members of a single family, defining "family" to preclude a grandmother living with her two grandchildren, as being "a means not reasonably related to the ends it seeks to achieve." *Moore v. City of East Cleveland*, 431 U.S. 494, 500 (1977)(plurality). Justice Stevens in his concurring opinion wrote:

> In my judgment the critical question presented by this case is whether East Cleveland's housing ordinance is a permissible restriction on appellant's right to use her own property as she sees fit. . . . Long before the original States adopted the Constitution, the common law protected an owner's right to decide how best to use his own property.

Id. at 512.

Justice Stevens' opinion underscored the importance to a property owner deciding just who will reside in his property:

> Since this ordinance has not been shown to have any "substantial relation to the public health, safety, morals, or general welfare" of the city of East Cleveland, and since it cuts so deeply into a fundamental right normally associated with the ownership of residential property -- that of an owner to decide who

> may reside on his or her property -- it must fall under the limited standard of review of zoning decisions which this court preserved in *Euclid* and *Nectow*.

Id. at 520.

Thus, the state certainly could not force the Petitioner to live with her grandchildren, or without her grandchildren -- or even to live with an unmarried couple -- in her own house. But the unanswered question, however, is: may the state force her to allow such persons to occupy her property against her will if she does not reside on the premises? In other words, is the "fundamental right of property ownership to decide who may reside in the property -- or whom she may exclude from the property -- extinguished when the property is put up for rent. *Amicus curiae* urges this Court to grant the Petition and resolve this important constitutional issue.

SUMMARY OF ARGUMENT

Fortunately for property owners, this Court has never taken such a cavalier attitude toward fundamental property rights as to hold that the lessor relinquishes the right to exclude when the property is made available for rent (as might be suggested by *Yee v. City of Escondido, California,* 503 U.S.

519 (1992)). To the contrary, in a variety of circumstances, this Court has staunchly upheld the rights of property owners to exclude others from their property even in situations where the intrusion is *de minimus*. *Loretto*, 458 U.S. 419, 438 (1982)(even *de minimus* invasions of private property trigger the protections of the Fifth Amendment.)

Moreover, this Court has repeatedly held that the deprivation of a fundamental property right constitutes a *per se* violation of the Fifth Amendment unless just compensation is paid to the owner. *See, e.g., Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). Describing the incidents of property ownership as a "bundle of sticks," this Court has cautioned that "the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Andrus v. Allard*, 444 U.S. 51, 66 (1979). But, a regulation or statute which deprives the property owner of a fundamental aspect of private property ownership can be a *per se* unconstitutional taking. For example, Native Americans who were deprived of the "right to pass on property -- to one's family in particular -- [which] has been part of the Anglo-American legal system since feudal times" so

impairs this bundle of rights as to constitute an invalid taking, without just compensation. *Hodel v. Irving*, 481 U.S. 704, 717 (1987).

Likewise, this Court has held on numerous occasions that the right to exclude others from one's property is such a fundamental right of private property ownership that its destruction (without payment of just compensation) is also a *per se* violation of the Fifth Amendment. *See, e.g., Loretto v. TelePrompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *see also International News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918)("An essential element of individual property is the legal right to exclude others from enjoying it.")(J. Brandeis)(dissenting opinion).

On the other hand, this Court has held that the right of unmarried individuals to live together is not a constitutionally protected right. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). Indeed, as the concurring and dissenting opinion below of Justice Kennard points out, even the State of California discriminates against unmarried couples who want

to live together in some of its own public housing programs. (A.14a).[2]

Moreover, other courts have also questioned whether the purpose of the statute at issue in this case -- which is designed to eliminate housing discrimination against unmarried heterosexual couples -- is even a legitimate governmental interest. *See, e.g., Attorney General v. Desilets,* 418 Mass. 316, 327, 636 N.E.2d 233, 239 (1993); *State by Cooper v. French,* 460 N.W.2d 2, 10 (Minn. 1990); *see also Swanner v. Anchorage Equal Rights Commission,* 115 S. Ct. 460, 461 (1994).

Justice Kennard points out the lack of any "problem" for which the statute at issue purports to provide a "solution".

> California authorities are arguing . . . that states have a compelling interest in forcing conscientiously objecting landlords to rent apartments to unmarried couples. [They do not] mention [] any evidence that unmarried couples were actually having difficulty finding housing; without such evidence, this claim of compelling interest is utterly frivolous.

Laycock & Thomas, *Interpreting the Religious Freedom Restoration Act,* 73 Tex.L.Rev. 209, 223-224 (1994).

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[2] Reference to the Petitioner's Appendix to Petition for Writ of Certiorari

In short, the Petitioner in this case has had her constitutional right to exclude others from her property extinguished through application of the state's law forbidding her to exclude unmarried, heterosexual couples from her premises. No compensation has been paid to her for her loss of this fundamental property right. Moreover, the state has offered no compelling interest to justify the infringement on her constitutionally protected property rights. Thus, unless this Court decides that a property owner 's right to exclude others is modified or extinguished when the property is rented (or that unmarried heterosexual couples are a protected class), the decision of the court below should be summarily reversed. Or, alternatively, the Petition for a Writ of Certiorari should be granted so that this Court can clarify the nature of the right to exclude others in the context of private property that has been rented.

REASONS WHY THE PETITION SHOULD BE GRANTED

I. THE RIGHT TO EXCLUDE OTHERS FROM ONE'S PROPERTY IS ONE OF THE MOST FUNDAMENTAL ASPECTS OF PRIVATE PROPERTY OWNERSHIP.

The right to make reasonable use of one's property is protected by the Fifth Amendment's Just Compensation clause. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992). More specifically, the property rights in land have been described as the right "to possess, use, and dispose of it." *Loretto v. TelePrompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982), *quoting from United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). As Justice Marshall explained in *Loretto*:

> [T]he property owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. The right to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights.

Id. at 435.

As this Court has repeatedly held: "a physical intrusion by government [is] a property restriction of an

unusually serious character for purposes of the Takings Clause. . . . In such a case, 'the character of the government action' not only is an important fact in resolving whether the action works a taking but also is determinative." *Loretto*, 458 U.S. at 426; *see also United States v. Causby*, 328 U.S. 256 (1946)(loss of ability to exclude others from privately owned airspace violated the Fifth Amendment).

In *Hodel v. Irving*, 481 U.S. 704, 716 (1987), this Court noted in the context of [a case involving the right of Indians to devise] that "one of the most essential sticks in the bundle of rights that are commonly characterized as property -- is the right to exclude others."

Likewise, in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), this Court held that government imposition of a navigational servitude requiring public access to a privately owned pond was an unconstitutional taking. The Court emphasized that the servitude took the landowner's right to exclude, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Id.* at 176.

The statute at issue here deprives plaintiff of the right to exclude unwanted persons from her private property. The only question is whether that deprivation (without compensation) is rendered "constitutional" by virtue of the fact that she leases the property. This Court should grant the Petition for Certiorari to resolve this issue.

II. IN SHARP CONTRAST, THERE IS NO CONSTITUTIONAL RIGHT OF UNMARRIED PERSONS TO LIVE TOGETHER.

In *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), this Court was faced with a city ordinance that restricted land use to one-family dwellings, and defined the word "family" to mean one or more persons related by blood, adoption, or marriage, or not more than two unrelated persons, living, and cooking together as a single housekeeping unit. Justice Douglas, writing for the Court, upheld the validity of the ordinance, explaining that there is no constitutional right of unrelated persons to live together:

> It involves no "fundamental" right guaranteed by the Constitution, such as voting; the right of association; the right of access to the courts; or any rights of privacy. We deal with economic

> and social legislation where legislatures have historically drawn lines . . .

Id. at 7.

In *Village of Belle Terre,* the community had decided that precluding non-related individuals from living together would allow neighborhoods to maintain a more peaceful, less crowded, family-oriented atmosphere. Thus, this Court upheld the validity of the challenged ordinance as a rational means to achieve a legitimate public purpose:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within *Berman v. Parker, supra.* The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Id. at 9.

Not only has this Court upheld the discrimination against unmarried, heterosexual persons living together, discrimination against such persons is sanctioned in a variety of contexts by all levels of government as a rational means to achieve a legitimate governmental purpose. For example, as Justice Kennard in his concurring and dissenting opinion to

the majority opinion below pointed out, even the State of California "has authorized both public and private universities to discriminate in housing on the basis of marital status, permitting them to offer housing reserved for married students." (A.94a).

Likewise, the federal government typically limits retirement benefits, social security benefits, tax credit benefits, and other similar benefits to married couples -- and denies them to individuals who are not related. Similarly, our Armed Forces typically provide "married" housing units and "bachelor's" quarters, often located in separate areas on military bases.

The State of California may well be right that prohibiting housing discrimination against unmarried, heterosexual couples is a good idea, but since the right of unmarried persons to live together is not a constitutionally protected right, the state is not free to abridge constitutionally protected property rights to achieve that objective. Indeed, as Justice Oliver Wendall Holmes warned back in 1922: "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than

the constitutional way of paying for the change."

Pennsylvania Coal v. Mahon, 260 U.S. 393, 416 (1922).

III. EXTINGUISHING THE RIGHT OF A PROPERTY OWNER TO EXCLUDE OTHERS FROM HER PROPERTY WITHOUT PAYMENT OF JUST COMPENSATION VIOLATES THE FIFTH AMENDMENT.

A holding by this Court that the right to exclude others from one's property is extinguished by renting the property would fly in the face of decades of this Court's jurisprudence. For example, in *Dolan v. City of Tigard,* 114 S. Ct. 2309 (1994), the owner of a commercial plumbing supply store was required to grant approximately ten percent of her property to the City for a public bicycle/pedestrian pathway in exchange for a building permit to enlarge her store. Mrs. Dolan refused, arguing that she had no desire to open up her property to the public at large, even though she clearly had invited the public to shop at her store. This Court upheld her right to exclude the public from her property, and held that in order to condition a permit requirement upon the granting of an easement for public

access the city must demonstrate that there is a rough proportionality between the burden imposed by the development and the requirement.

Likewise, in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), this Court invalidated a requirement that an easement for public ingress and egress along the beach be donated as a condition of permitting reconstruction of a beach house -- thereby resulting in the loss of their ability to exclude others from the property. This Court found such a requirement unconstitutional because the condition did not substantially advance its avowed purpose, and also abridged constitutionally protected property rights. As this Court observed: "[T]he Commission may well be right that [public access] is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization." *Id.* at 841.

There is no suggestion whatsoever in the *Nollan* decision that had the Nollans owned the property as a rental unit, that the state would then be free to condition the building permit application upon the Nollans giving up their right to exclude others from their property. Nevertheless, if the

decision below were the law of the land, that would indeed be the logical outcome of the *Nollan* case.

Finally, in *Kaiser Aetna v. United States,* 444 U.S. 164 (1979), the owners of a private lagoon had invested millions of dollars to transform a pond into a marina community servicing the 20,000 persons around the pond. To create the marina required dredging a channel connecting the Kuapa Pond to a bay and the Pacific Ocean. Nevertheless, the marina owners still maintained control over who could enter their pond. The government asserted that connecting Kuapa Pond to the ocean ("navigable waters of the United States ") transformed the pond into public property. This Court rejected that argument even though clearly the privately owned property was open to any member of the public willing to paying the annual $72 membership fee:

> In this case, we hold that the "right to exclude," so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation. . . . Thus, if the Government wishes to make what was formerly Kuapa Ponds into a public aquatic park . . . it may not, without invoking its eminent domain power and paying just compensation, require them to allow free access to the dredge pond

> while petitioners' agreement with their customers calls for an annual $72 regular fee.

Id. at 180; *see also Moore v. City of East Cleveland,* 431 U.S. 494 (1977)("we are satisfied that the remedy here adopted constitutes a sweepingly excessive restriction of property rights as against the problem sought to be dealt with, and in legal contemplation deprives plaintiffs of their property without due process.")

In the instant case, Petitioner's agreement with her customers (lessees) require not only that they pay rent, but that they be a legally married couple. If the state of California wants to deprive petitioner of the right to exclude unmarried heterosexual couples, preserved by that agreement, then it must exercise its power of eminent domain and achieve its objective by no less than "the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 416 (1922). Otherwise, the state cannot simply take Petitioner's right to exclude others from her property without paying her compensation, violating the Just Compensation Clause.

CONCLUSION

For all of the foregoing reasons *amicus curiae* hereby respectfully urge this Court to grant the petition for a Writ of Certiorari and resolve these significant constitutional issues.

Respectfully submitted,

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